(1)

Supreme Court, U.S.
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No. 02-881

IN THE

Supreme Court of the United States

FRANK H. SMITH AND HARRIETT C. SMITH,

Petitioners

v.

UNITED PARCEL SERVICE, INC.

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Tuscaloosa, AL 35403
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53 pp

Questions Presented for Review

What are the limits of federalism and preemption as they relate to the Carmack Amendment to the Interstate Commerce Act? Specifically, does the surviving legislative form of the Carmack Amendment pre-empt all state causes of action even remotely related to a contract of carriage of goods, or does it preempt only those causes of action related to core activities having to do with a contract of carriage of goods and damage to those goods?

Parties and Corporate Disclosure Statement

Parties:
Pamela Burnette Marlow (Defendant)
Frank H. Smith (Plaintiff)
Harriet Smith (Plaintiff)
United Parcel Service, Inc. (Ohio) (Defendant)

Corporate Disclosure:
2855-8278 Quebec, Inc.
724352 Ontario Limited
Air Compak International
Allison, Vance
American Customs Brokers, Inc.
Associated Customs Brokers, Inc.
Atexco (1991) Limited
Atlasair Limited
Avenair Corporation
Big Apple, LLC
Border Brokerage Company, Inc.
BT Property, LLC
BT Realty Holdings II, Inc.
BT Realty Holdings, Inc.
BT Realty II, Inc.
BT Realty, Inc.
BT-Newyo, LLC
BT-OH, LLC
Buckeye Management Service, LLC
C.C. & E. Holding, Inc.
C.C. & E.I, LLC
Carryfast Holdings Limited
Carryfast Limited
CLS Group Pty Ltd.
CLS (HK) Limited
CLS Pacific Rim Pte Ltd.
Computer Logistics Solutions Pty. Ltd.

Condel, LLC
ConectShip, Inc.
Diversified Trimodal, Inc.
El Paso Distribution Center, Inc. (One)
El Paso Distribution Center, Inc. (Two)
Elsil Corporation
Evind Corporation
FEX Corp.
First International Bankcorp, Inc.
First International Bank
First International Capital Corp. of New Jersey
FIB Business Loans Holdings, Inc.
FIB Funding Corp.
FIB Holdings, Inc.
FNBNE Business Loans Holdings, Inc.
FNBNE Funding Corp.
FNBNE SBA Holdings, Inc.
FNC International, Inc.
Fritz Air Freight, Inc.
Fritz Companies, Inc. (d/b/a Fritz, a UPS Company)
Fritz Domestic Services
Fritz Export Packing, Inc.
Fritz Government Services, Inc.
Fritz International Insurance Brokers
Fritz Transportation International
Frontier Freight Forwarders, Inc.
Gator Management Services, Limited Liability Company
Glenlake Financial Corp.
Glenlake Insurance Agency, Inc. of Alabama
Glenlake Insurance Agency, Inc. of California
Glenlake Insurance Agency, Inc. of Kentucky
Glenlake Insurance Agency, Inc. of Massachusetts
Glenlake Insurance Agency, Inc. of Nevada
Glenlake Managing General Agency, Inc. of Texas
Global Mail Boxes Express, Inc.
Global Management Service L.L.C.

Great Plains Management Services, Limited Liability Company
H.A. & J.L. Wood, Inc.
Haulfast, Limited
Herman Miles Trucking, Inc.
High Sierra Management Services, Inc.
iShip, Inc.
Lacalos Corporation
Livingston Healthcare Services, Inc.
Logistics Service (U.S.A.) Co., Inc. (Parent company is Logistics Holding Ltd., a Hong Kong Corporation)
Lone Star Management Services, LLC
Mail2000, Inc.
Mail Boxes Etc., Inc.
Merchants Parcel Delivery
Miles & Joffroy, Inc.
Miles Group, Inc.
Nevair Corporation
New Neon Co., Inc.
Nubee, Inc.
Oasis Wholesale Supply Corporation
Parkprop, Inc.
Pax Logistics International, Ltd.
PPS Polkurier Sp. Z. oo (to be changed to UPS Polska Sp. Z. oo)
Prost-Transports S.A. Speditionsgessellschaft MbH
PT UPS Cardig International
RealAmerica Co.
RMX
Roadnet Technologies, Inc.
Rudolph Miles & Sons Incorporated
Salt Lake Management Services, Limited Liability Company
Saskan Corporation
Shannon MRO Ltd.
Solacel Company
T.G. International Inc.

The UPS Foundation, Inc.
Trade Management Services
Trailer Conditioners, Inc.
Trans-Border Customs Services, Inc.
Tri-State Distribution, Inc. (One)
Tri-State Distribution, Inc. (Two)
Tri-State Distribution, Inc. (Three)
Tri-State Distribution, Inc. (Four)
Tri-State Distribution, Inc. (Five)
Ukrainian Parcel Service
ULA, LLC
United Parcel Service Pte Ltd
United Parcel Service
United Parcel Service (Bahrain) WLL
United Parcel Service Belgium N.V.
United Parcel Service (Bermuda) Ltd.
United Parcel Service Canada Ltd.
United Parcel Service Cayman Islands Limited
United Parcel Service Co.
United Parcel Service Co., Japan Branch
United Parcel Service Co., Singapore Branch
United Parcel Service CSTC Ireland Limited
United Parcel Service Czech Republic S.R.O.
United Parcel Service de Chile, Ltda.
United Parcel Service de Mexico, S.A. De C.V.
United Parcel Service Deutschland Inc.
United Parcel Service Deutschland Inc. & Co. OHG
United Parcel Service Espana Ltd.
United Parcel Service Espana Ltd. y Compania S.R.C.
United Parcel Service Finland OY
United Parcel Service France S.N.C.
United Parcel Service General Services Co.
United Parcel Service, Inc., a Delaware corporation owning 100% of the outstanding common stock of United Parcel Service of America, Inc. United Parcel Service, Inc. is the only UPS-related entity that has outstanding common stock

issued in a public offering.
United Parcel Service, Inc (New York)
United Parcel Service, Inc. (Ohio)
United Parcel Service Italia, S.R.L.
United Parcel Service Japan Y.K.
United Parcel Service Jersey Limited
United Parcel Service (Malaysia) Sdn. Bhd.
United Parcel Service Nederland B.V.
United Parcel Service Nigeria Ltd.
United Parcel Service Oasis Supply Corporation
United Parcel Service of America
United Parcel Service of America (UK)
United Parcel Service of America, Inc. ("UPS"). UPS is wholly owned by United Parcel Service, Inc. UPS has outstanding debt securities that were issued in public offerings.
United Parcel Service of Ireland Limited
United Parcel Service PTY, Ltd.
United Parcel Service (Rus.) o.o.o.
United Parcel Service Singapore Pte, Ltd.
United Parcel Service Speditongesellenschaft m.b.H.
United Parcel Service Sweden AB
United Parcel Service (Switzerland)
United Parcel Service (Transport) Sdn. BHD.
United Parcel Service (UAE) LLC
Unlimited National, Inc.
UPICO Corporation
UPS Air Cargo Service GmbH
UPS Air Couriers of America Limited
UPS Air Leasing, Inc.
UPS Autologistics, Inc.
UPS Aviation Services, Inc.
UPS Aviation Technologies, Inc.
UPS Business Communications Services, Inc.
UPS Capital Corporation
UPS Capital Global Trade Finance Corporation

UPS Capital Global Trade Finance (HK) Limited
UPS Capital Global Trade Finance (U.K.) Ltd.
UPS Capital Technical Logistics, LLC
UPS Cayman Limited
UPS Consulting, Inc.
UPS Customhouse Brokerage, Inc.
UPS de Argentina, S.A.
UPS de San Jose, S.A.
UPS Delbros International Express Ltd., Inc.
UPS–Delbros International Express, Inc.
UPS Denmark A/S
UPS Deutschland Management LLC
UPS do Brasil & CIA
UPS Dominicana, S.A.
UPS e-Logistics, Inc.
UPS Europe N.V./SA.
UPS e-Ventures, Inc.
UPS–Fliway (NZ) Ltd.
UPS Full Service Brokerage, Inc.
UPS Grundstuecksverwaltung S GmbH
UPS Holding GmbH
UPS Hungary kft
UPS India PVT, Ltd.
UPS International, Inc.
UPS International Forwarding, Inc.
UPS International General Services, Inc.
UPS International, Inc. Taiwan Branch
UPS Internet Services, Inc.
UPS Japan Limited
UPS Jetair Express Pvt. Ltd.
UPS Jetair Logistics Pte. Ltd.
UPS–Korea Express Co., Ltd.
UPS (KZ)
UPS Latin America, Inc.
UPS Limited
UPS Logistics Canada, Ltd.

UPS Logistics Group Americas, Inc.
UPS Logistics Group Argentina S.R.L.
UPS Logistics Group Asia Pte, Ltd.
UPS Logistics Group (Barbados) SRL
UPS Logistics Group BV
UPS Logistics Group Bolivia Limitada
UPS Logistics Group Brazil Ltda.
UPS Logistics Group Canada Ltd.
UPS Logistics Group Columbia Ltda.
UPS Logistics Group Costa Rica, Ltda.
UPS Logistics Group El Salvador, Limitada
UPS Logistics Group GmbH
UPS Logistics Group Guatemala, Limitada
UPS Logistics Group Honduras S. de R.L.
UPS Logistics Group, Inc.
UPS Logistics Group International Chile Limitada
UPS Logistics Group International, Inc.
UPS Logistics Group Investments, Inc.
UPS Logistics Group Jamaica Limited
UPS Logistics Group Japan Branch
UPS Logistics Group Ltd.
UPS Logistics Group Nicaragua, S.A.
UPS Logistics Group Panama, S.A.
UPS Logistics Group Paraguay, S.R.L.
UPS Logistics Group Peru, S.R.L.
UPS Logistics Group Pty Ltd.
UPS Logistics Group Puerto Rico, Inc.
UPS Logistics Group S.A.
UPS Logistics Group S.R.L.
UPS Logistics Group Trinidad & Tobago, Unltd.
UPS Logistics Group (UK) Limited
UPS Logistics Group Uruguay S.R.L.
UPS Logistics Group USVI, LLC
UPS Logistics Group Venezuela, Compania En Comandita por Acciones
UPS Logistics Services Americas, Inc.

UPS Logistics Services, S. de R.L. de C.V.
UPS Logistics Technologies, Inc.
UPS Mail Services
UPS Messaging, Inc.
UPS of America Limited
UPS of Bermuda, Inc.
UPS of China, Inc.
UPS of Greece, Inc.
UPS of Greece, Inc. Athens Branch
UPS of Norway, Inc.
UPS of Portugal–Transportes Internacionals de Mercadorias LDA
UPS of Portugal, Inc.
UPS of Portugal, Inc. Lisbon Brance
UPS Parcel Delivery Service Limited
UPS Parcel Delivery Service Limited (Thailand)
UPS Procurement Services Corporation
UPS Professional Services Inc.
UPS Properties, Inc.
UPS PTY, Ltd.
UPS Re Ltd.
UPS Sinotrans Beikong International Express Co. Ltd.
UPS Sovtransavto
UPS Spain, S.L.
UPS Supply Chain Management, Inc.
UPS Telecommunications, Inc.
UPS Transport GmbH
UPS Transport GmbH II
UPS (UK) Limited
UPS Worldwide Forwarding, Inc.
UPS Worldwide Logistics Asia Pte, Ltd.
UPS Worldwide Logistics Asia Pte, Ltd., Taiwan Branch
UPS Worldwide Logistics de Mexico
UPS Worldwide Logistics GmbH
UPS Worldwide Logistics (India)
UPS Worldwide Logistics SARL

UPSWWL Management Services Limited
UPS Yamato Co., Ltd.
UPS Yamato Express Co., Ltd.
Vista Distribution Center, Inc. (One)
Vista Distribution Center, Inc. (Two)
Vista Distribution Center, Inc. (Three)
Vista Distribution Center, Inc. (Four)
Vista Distribution Center, Inc. (Five)
Wall Shipping Co., Inc.
William F. Joffroy, Inc.
Worldwide Dedicated Services, Inc.
Worldwide Logistics de Mexico, S.A. de C.V.
W.Y. Moberly, Inc.
Yamato UPS International Air Cargo Co., Ltd.
Zanas Group LLC

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Table of Cited Authorities

New York, New Haven & Hartford Railroad Co. v. Nothnagle, 346 U.S. 128 (1953) 7

Citations of Reports of the Opinions and Orders Entered

The opinion of the Eleventh Circuit is reported at Smith v. Marlow, 296 F.3d 1244 (11th Cir., 2002); the opinion of the court below is not reported. (App.)

Basis for Jurisdiction

The United States Court of Appeals for the Eleventh Circuit entered its opinion below on July 11, 2002. This Court has jurisdiction under 28 U.S.C. §1254(1).

Statutes Involved in the Case

49 U.S.C. §14706 (Set forth in Appendix)

Statement of the Case

All facts are taken directly from recitals in Plaintiffs' complaint. (R-1)

On or about October 21, 1998, Plaintiff Frank Smith ("Frank"), who is legally blind, expected to take delivery from UPS of a Gateway computer which had been shipped to him. The computer held specialized software for people with his disability. Frank asked his son ("Matthew" – not a party) to come by that day and set up the computer for him.

UPS did not deliver the package, but instead left a note saying that it had attempted delivery. Plaintiffs, who had been home the entire time, called UPS and demanded delivery that same day.

When the UPS truck arrived, Plaintiff Harriett Smith ("Harriett") asked Frank and Matthew to assist the driver, Defendant Pamela Burnette Marlow ("Marlow") with bringing in the boxes. When Frank and Matthew walked to the truck, Marlow spoke harshly to them. Matthew reciprocated by calling Marlow an unflattering and derogatory name.

Marlow responded by asserting that she would not deliver the computer, and thereupon pulled down the door of the truck. Matthew stopped the door on its descent and injured his arm. Marlow became hysterical and screamed for help, asserting repeatedly that "these are terrible people." Marlow then closed the door of her truck, drove down the street and parked from some period of time, and then departed. She also reported the incident to the police, who investigated but made no arrest.

Later that same evening the local manager of the UPS office personally delivered the computer.

Since that date, through the filing of the Complaint, UPS has failed to make deliveries to Plaintiffs' home. Instead, UPS mails notices to Plaintiffs' home stating "we are unable to complete delivery because: correct street number needed, not delivered." When the packages are

picked up from UPS offices, they are all properly addressed, however. Some packages are returned to their sender by UPS because Frank, who is legally blind, is not able to read the notices or pick up the packages if his wife is out of town. UPS repeatedly promised Plaintiffs that their packages would be delivered, and then continued its same course of conduct. In fact, UPS told third parties that it would not make deliveries to Plaintiffs.

Defendants removed this case to the United States District Court for the Northern District of Alabama, Western Division where it remained over Plaintiffs' Motion to Remand. The court refused to remand because it found federal question jurisdiction for several of the counts alleged by Plaintiffs.

Argument

Congress passed the Carmack Amendment in 1906. This Court last visited the Amendment to examine preemption issues in 1953. During the first decade of the Amendment, some unfortunately broad dicta in this Court's decisions entrenched itself in the lower courts and resulted in almost near-unanimity that the Carmack Amendment granted wide sweeping and nearly complete protections to the shipping industry. Some appellate courts have chiseled out limited exceptions involving outrage or other such causes of action. Others have decried the unjust results they felt constrained to endorse, but opined that their hands were tied.

Plaintiffs' analysis of the relevant decisions of this Court leads them to the opinion that the lower courts have misinterpreted this Court's decisions as being more broad than intended. These misinterpretations have been perpetuated so that precedent built on precedent at the trial and appellate level, but this Court has been silent since 1953.

To be succinct, the Carmack Amendment fixed liability on the first carrier to accept goods into interstate commerce, even if other carriers had custody and control when the damage occurred. In return, carriers were granted the ability to limit their liability to a stated value for the goods, unless the shipper chose to pay a higher freight charge and, in effect, purchase insurance.

This Court has always interpreted the Carmack Amendment in terms of the contract of carriage between carrier and shipper. The most recent such decision was in 1953, with *New York, New Haven & Hartford Railroad Co. v. Nothnagle*, 346 U.S. 128 (1953), when it found that, because Mrs. Nothnagle had not been given an opportunity to pay a higher rate and obtain better coverage in the event of loss, the Carmack Amendment never came into play and plaintiff was not limited in her remedies.

Since 1953, this Court has been silent, despite

a wide variety of trial and appellate court decisions holding that Carmack was an almost complete shield for the carrier industry for any harm which had anything to do with a package entrusted to the carrier. This cannot have been the intent of this Court, and it is now time to correct the lower courts in this regard.

Sec. **14706**. - Liability of carriers under receipts and bills of lading

(a) General Liability. -

(1) Motor carriers and freight forwarders. -

A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by

(A)

the receiving carrier,

(B)

the delivering carrier, or

(C)

another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the

destination but does not include a carrier providing only a switching service at the destination.

(2) Freight forwarder. -

A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) Apportionment. -

The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c) Special Rules. -

(1) Motor carriers. -

(A) Shipper waiver. -

Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to

jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) Carrier notification. -

If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

(C) Prohibition against collective establishment. -

No discussion, consideration, or approval as to rules to limit liability under this subsection may be undertaken by carriers acting under an agreement approved pursuant to section 13703.

(2) Water carriers. -

If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(d) Civil Actions. -

(1) Against delivering carrier. -

A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.

(2) Against carrier responsible for loss. -

A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(3) Jurisdiction of courts. -

A civil action under this section may be brought in a United States district court or in a State court.

(4) Judicial district defined. -

In this section, "judicial district" means -

(A)

in the case of a United States district court, a judicial district of the United States; and

(B)

in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) Minimum Period for Filing Claims. -

(1) In general. -

A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

(2) Special rules. -

For the purposes of this subsection -

(A)

an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(B)

communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(f) Limiting Liability of Household Goods Carriers to Declared Value. -

A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability

of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

(g) Modifications and Reforms. -

(1) Study. -

The Secretary shall conduct a study to determine whether any modifications or reforms should be made to the loss and damage provisions of this section, including those related to limitation of liability by carriers.

(2) Factors to consider. -

In conducting the study, the Secretary, at a minimum, shall consider -

(A)

the efficient delivery of transportation services;

(B)

international and intermodal harmony;

(C)

the public interest; and

(D)

the interest of carriers and shippers.

(3) Report. -

Not later than 12 months after January 1, 1996, the Secretary shall submit to Congress a report on the results of the study, together with any recommendations of the Secretary (including legislative recommendations) for

implementing modifications or reforms identified by the Secretary as being appropriate.

SMITH v. UPS, No. CV-01-N-00306-W (N.D. Ala. Jul. 3, 2001).

FRANK H. SMITH AND HARRIETT C. SMITH, Plaintiff(s), vs. UNITED PARCEL SERVICE, et al., Defendant(s).

CV-01-N-00306-W

United States District Court, Northern District of Alabama, Western Division

Decided July 3, 2001.

John A. Owens, Owens & Almond, LLP, Tuscaloosa, AL, for Plaintiffs.

John E. Goodman, Rusha Smith, Bradley, Arant, Rose & White, LLP, Birmingham, AL, Ruth N. Borenstein, Paul T. Friedman, Gregory B. Koltun, Morrison & Foerster, LLP, San Francisco, CA, J. Mark White, White, Dunn, Booker, Birmingham, AL, for Defendants.

Order

I. Introduction

The Court has for consideration defendants UPS and Marlow's Motion for Judgment on the Pleadings based on preemption Grounds [Doc. 6], Motion to Dismiss by New Defendants added in the Amended Complaint [Doc. 6], and plaintiffs' Motion to Remand, or in the alternative, for Leave to Amend [Doc. 13]. The motions have been briefed and are ripe for decision. Upon due consideration, the motion for judgment on the pleadings is **DENIED**, the motion to dismiss is **GRANTED**, and the motion to remand, or in the alternative, leave to amend, is **DENIED**. In accord with the Court's May 17, 2001 order [Doc. 27], plaintiffs are allowed 10 days after the Court rules on the pending motions to add

causes of action or parties. Any amendments must be in accord with the direction in this memorandum.

II. Factual Allegations in the Complaint

Plaintiff Frank Smith ("Mr. Smith") ordered a computer which was to be delivered via UPS. On the day the computer was to arrive, Mr. Smith found a note on his door from UPS, stating that delivery was attempted but no one was home. It is inferred in the Complaint that Mr. Smith and his son waited for the delivery of the computer at Mr. Smith's home, and they were actually at home when UPS attempted delivery. At any rate, plaintiff Harriet Smith ("Mrs. Smith") called UPS and insisted they deliver the computer that day.

Some time later that same day, defendant Pamela Marlow (Marlow), a UPS employee, arrived at the plaintiff's home in a UPS truck. Mr. Smith and his son went to the truck to assist Marlow, who "was obviously angered at having to make the return trip and had some harsh words to say to [Mr. Smith and his son]." (Compl. at 2.) Mr. Smith's son became angered by Marlow's statements and called her "an unflattering and derogatory name." (Compl. at 3.) Marlow then said she would not deliver the computer and pulled the truck's door down. Mr. Smith's son raised his arm to stop the door from being pulled down, and Marlow became hysterical and started screaming. She did not deliver the computer and drove away. Another UPS employee delivered the computer that evening.

Ever since the incident, UPS has refused to deliver to the Smith house. Additionally, UPS mails notices to the home stating "we are unable to complete delivery because: correct street number needed, not delivered." Yet, when the plaintiffs pick up their packages at the UPS office, the packages are property addressed. Further, goods have been returned to sender because Mr. Smith, who is blind, cannot

read the mail when Mrs. Smith is out of town. The plaintiffs then pay shipping costs twice.

Plaintiffs' Complaint and the Amendment to the Complaint include only state law claims: Count I: Discrimination in overcharging; Count II: Fraud; Count III: Negligence, Wantonness, or Willfulness; Count IV: Outrage; Count V: Suppression; Count VI: Conspiracy; Count VII: Injunctive relief; Count VIII: Negligent, wanton or willful conduct or misconduct in the failure to provide proper and appropriate policies and procedures and failure to provide appropriate training and supervision to employees of UPS; and Count IX: Claim for statutory penalties.[fn1]

III. Discussion

The same issue is presented in the three motions before the Court: whether the plaintiffs' claims are preempted by the Federal Aviation Administration Authorization Act ("FAAAA")[fn2] and/or the Carmack Amendment to the Interstate Commerce Act. Additionally, defendants contend the plaintiffs' negligent supervision count fails to state a claim upon which relief can be granted. Plaintiffs also request that the Court provide them leave to amend their Complaint if their motion to remand is denied.

A. Preemption by the Carmack Amendment

Both parties are aware of this Court's decision in *Construction Services, Inc. v. Watkins Motor Lines, Inc.*, No. CV-98-0628-NE, 1998 U. S. Dist. LEXIS 22818 (N.D. Ala. May 5, 1998). As this Court found in that case, "[m]ost courts; including this one, have held that claims not asserted under the Carmack Amendment are preempted if they seek to recover damage or loss to goods during shipment, for misdelivery or untimely delivery of good, for failure to the carrier to fulfill duties closely related to its duty of delivery, or for charging an improper rate for transporting goods." *Id.* at *9. All of the plaintiffs' claims fall into this category. Each

count is based on UPS' failure to deliver or misdelivery of goods to the Smiths. Count I, discrimination in overcharging, is based on the failure of UPS to deliver goods to the Smiths. The basis for Count II, fraud, is UPS' acceptance of items for delivery to the Smiths with no intention to deliver the product. Moreover, UPS told the Smiths it would deliver to them, but has failed to do so. Count III, negligence, wantonness, or willfulness, is described as UPS' failure to carry out its duty to deliver packages to the Smiths. The substance of Count IV, outrage, is"[t]he actions of the Defendants to deny deliveries." (Compl. ¶ 20.) Count V, suppression, is based on UPS' failure to disclose the reason for the stoppage in deliveries to the Smiths. The conspiracy allegations, Count VI, describe a conspiracy to undertake all of the above listed counts. In Count VII, the plaintiffs request injunctive relief to stop defendants from failing and refusing to make a reasonable, good faith effort to deliver packages to the plaintiffs' home. Count VIII is based on the failure of UPS employees to properly train other employees to avoid the conduct which led to this case. In Count IX, plaintiffs request statutory penalties.

B. Leave to Amend Complaint

In alternative to the Court remanding the case, plaintiffs moved the Court to provide them leave to amend their complaint. They desire to add two causes of action: Count XI, Cause of Action based Upon U.S.C. § 10741, and Count XII, Violation of RICO Act, 18 U.S.C. § 1961, et seq.

1. Count XI

In Count XI, plaintiffs seek to add a course of action entitled "Prohibitions against discrimination by rail carriers," which they claim applies to motor carriers.

> (a)(1) A rail carrier providing transportation or service subject to the jurisdiction of the

> Board under this part [49 USCS § 10101 et seq.] may not subject a person, place, port, or type of traffic to unreasonable discrimination. (2) For purposes of this section, a rail carrier engages in unreasonable discrimination when it charges or receives from a person a different compensation for a service rendered, or to be rendered, in transportation the rail carrier may perform under this part [49 USCS § 10101 et seq.] than it charges or receives from another person for performing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances.
>
> (b) This section shall not apply to–
>
> (1) contracts described in section 10709 of this title;
>
> (2) rail rates applicable to different routes; or
>
> (3) discrimination against the traffic of another carrier providing the transportation by any mode.
>
> (c) Differences between rates, classifications, rules, and practices of rail carriers do not constitute a violation of this section if such differences result from different services provided by rail carriers.

49 U.S.C. § 10741. Additionally, as part of Count XI, plaintiff includes a repealed statute dealing with motor carriers, 49 U.S.C. § 316(d). According to the Revised Title Table currently located at 49 U.S.C. § 316, the rail carrier statute cited by plaintiffs, 49 U.S.C. § 10741, includes portions of the repealed statue. It appears plaintiffs' belief that the rail carrier statue includes motor carriers stems from the partial inclusion of the repealed motor carrier

statue in the current rail carrier statue. However, the rail carrier statue does not mention motor carriers; it mentions only rail carriers. Therefore, it would be futile for plaintiffs to include a cause of action in their Complaint that does not apply to defendants.

2. Count XII

The RICO statute, 10 U.S.C. § 1962 (2001), prohibits four activities:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one

or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

The plaintiffs allege UPS violated RICO by repeatedly sending through the United States mail postcards to the plaintiffs, fraudulently stating that packages could not be delivered to the plaintiffs because their address was incorrectly listed on their packages. Plaintiffs further allege UPS undertook this action intentionally and their actions constitute mail fraud.

RICO claims are held to a heightened pleading requirement. *Bill Buck Chevrolet, Inc., v. GTE Florida, Inc.*, 54 F. Supp. 2d 1127 (M.D. Fla. 1999), *aff'd without opinion*, 216 F.3d 1092 (11th Cir. 2000). Additionally, the plaintiffs must plead fraud with particularity. Rule 9(b) of the Federal Rules provides "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other

condition of the mind of a person may be averred generally." Fed. R. Civ. P. 9(b). The Eleventh Circuit has observed that Rule 9(b) "serves an important purpose in fraud actions by alerting defendants to the 'precise misconduct with which they are charged' and protecting defendants 'against spurious charges of immoral and fraudulent behavior.'" *Durham v. Business Management Associates*, 847 F.2d 1505, 1511 (11th Cir. 1988) (quoting *Seville Indus. Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786, 791 (3d Cir. 1984), *cert. denied*, 469 U.S. 1211, 106 S. Ct. 1179, 84 L. Ed. 2d 327 (1985); *see also Friedlander v. Nims*, 755 F.2d 810, 813 n.3 (11th Cir. 1985) (providing that the "clear intent" of Rule 9(b) "is to eliminate fraud actions in which all the facts are learned through discovery after the complaint is filed"). However "Rule 9(b) must be read in conjunction with Rule 8(a) [of the Federal Rules of Civil Procedure], which requires a plaintiff to plead only a short, plain statement of the grounds upon which he is entitled to relief." *Brooks v. Blue Cross & Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997) (quoting *O'Brien v. National Property Analysts Partners*, 719 F. Supp 222, 225 (S.D.N.Y. 1989)). According to *Brooks*, a complaint satisfies Rule 9(b) if it sets forth:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and
>
> (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and
>
> (3) the content of such statements and the manner in which they misled the plaintiff, and
>
> (4) what the defendants "obtained as a consequence of the fraud."

Brooks, 116 F.3d at 1371 (quoting *Fitch v. Radnor Indus., Ltd.*, No. 90-2084, 1990 WL 150110, at *2 (E.D. Pa. Sept 27, 1990)); *see also Cooper v. Blue Cross & Blue Shield*, 19 F.3d 562 (11th Cir. 1994) ("[a fraud pleading] must include facts as to time, place, and substance of the defendant's alleged fraud").

The plaintiffs, as provided in the Court's May 17, 2001 order [Doc. 27], are allowed 10 days after the Court rules on the pending motions to add causes of action or parties. Because the plaintiffs' RICO claim does not meet the above described pleading requirements, the plaintiffs shall replead their RICO claim, if they still desire to state such a claim, within that period in accord with the below listed requirement. The claim shall include the facts plaintiffs rely upon to initiate this RICO cause of action as a result of the "reasonable inquiry" required by Rule 11, Federal Rules of Civil Procedure. The claim shall be in a form which uses the numbers and letters set forth below and shall reasonably follow the organization set out below. The Amended Complaint shall state in detail and with specificity the following information:

1. State whether the alleged unlawful conduct is in violation of 18 U.S.C. §§ 1962 (a), (b), (c), and/or (d).

2. List each defendant and state the alleged misconduct and basis of liability of each defendant.

3. List the alleged wrongdoers, other than the defendants listed above, and state the alleged misconduct of each wrongdoer.

4. List the alleged victims and state how each victim was allegedly injured.

5. Describe in detail the pattern of racketeering activity or collection of unlawful debts

alleged for each RICO claim. A description of the pattern of racketeering shall include the following information:

a. List the alleged predicate acts and the specified statues which were allegedly violated;

b. Provide the dates of the predicate acts, the participants in the predicate acts, and a description of the facts surrounding the predicate acts;

c. If the RICO claim is based upon the predicate offenses of wire fraud, mail fraud, fraud in the sale of securities, or fraud in connection with a case under U.S.C. Title 11, the "circumstances constituting fraud or mistake shall be stated with particularity, " Fed.R.Civ.P. 9(b). Identify the time, place and contents of the alleged misrepresentation or omissions, and the identity of persons to whom and by whom the alleged misrepresentations or omissions were made;

d. State whether there has been a criminal conviction for violation of the predicate acts;

e. State whether civil litigation has resulted in a judgment in regard to the predicate acts;

f. Describe how the predicate acts form a "pattern of racketeering activity;" and

g. State whether the alleged predicate acts relate to each other as part of a common plan. If so, describe in detail.

6. Describe in detail the alleged enterprise for each RICO claim. A description of the enterprise shall include the following information:

a. State the names of the individuals, partnerships, corporations, associations, or other legal entities, which allegedly constitute the enterprise;

b. Describe the structure, purpose, function and course of conduct of the enterprise;

c. State whether any defendants are employees, officers or directors of the alleged enterprise;

d. State whether any defendants are associated with the alleged enterprise, and if so, how;

e. State whether you are alleging that the defendants are individuals or entities separate from the alleged enterprise, or that the defendants are the enterprise itself, or members of the enterprise; and

f. If any defendants are alleged to be the enterprise itself, or members of the enterprise, explain whether such defendants are perpetrators, passive instruments, or victims of the alleged racketeering activity.

7. State and describe in detail whether you are alleging that the pattern of racketeering activity and the enterprise are separate or have merged into one entity.

8. Describe the alleged relationship between the activities of the enterprise and the pattern of racketeering activity. Discuss how the racketeering activity differs from the usual and daily activities of the enterprise, if at all.

9. Describe what benefits, if any, the alleged enterprise receives from the alleged pattern of racketeering.

10. Describe the effects of the activities of the enterprise or interstate of foreign commerce.

11. If the complaint alleges a violation of 18 U.S.C. § 1962(a), provide the following information:

    a. State who received the income derived from the pattern of racketeering activity or through the collection of an unlawful debt; and

    b. Describe the use or investment of such income.

12. If the complaint alleges a violation of 18 U.S.C. § 1962(b), describe in detail the acquisition or maintenance of any interest in or control of the alleged enterprise.

13. If the complaint alleges a violation of 18 U.S.C. § 1962(c), provide the following information:

    a. State who is employed by or associated with the enterprise.

b. State whether the same entity is both the liable "person" and the "enterprise" under § 1962(c).

14. If the complaint alleges a violation of 18 U.S.C. § 1962(d), describe in detail the alleged conspiracy.

15. Describe the alleged injury to business or property.

16. Describe the direct causal relationship between the alleged injury and the violation of the RICO statute.

17. List the damages sustained by reason of the violation of § 1962, indicating the amount for which each defendant is allegedly liable.

18. List all other federal causes of action, if any, and provide the relevant statute numbers.

19. List all pendent state claims, if any.

20. Provide any additional information that you feel would be helpful to the Court in connection with the RICO claim.

Done, this 3rd of July, 2001.

s/Edwin L. Nelson

United States District Judge

[fn1] Count X was dismissed at the request of the plaintiffs. [fn2] The Court finds the FAAAA does not apply to this case because it does not apply to "household goods." UPS' contracts says it cannot deliver "household goods" as defined by the FAAAA "for shippers who elect Daily Pickup Service," "3 Day Select Service," "Expedited Service," or service through a "Customer Counter," etc. UPS

facility. (Rqst for Judicial Notice [Doc. 18]). The Court does not know if the items at issue in this case fall into those categories. However, plaintiffs state that they waive any claims which do not pertain to the delivery of household goods, therefore only stating claims for the misdelivery/failure to deliver household goods and precluding the preemptive effect of the FAAAA.

SMITH v. UPS, No. CV-01-N-00306-W (N.D. Ala. Jul. 25, 2001)

FRANK H. SMITH AND HARRIETT C. SMITH, Plaintiff(s), vs. UNITED PARCEL SERVICE, et al., Defendant(s).

CV-01-N-00306-W

United States District Court, Northern District of Alabama, Western Division

Decided July 25, 2001.

John A. Owens, Owens & Almond, LLP, Tuscaloosa, AL, for Plaintiffs.

John E. Goodman, Rusha Smith, Bradley, Arant, Rose & White, LLP, Birmingham, AL, Ruth N. Borenstein, Paul T. Friedman, Gregory B. Koltun, Morrison & Foerster, LLP, San Francisco, CA, J. Mark White, White, Dunn Booker, Birmingham, AL, for Defendants.

Order

In an order entered on July 3, 2001, the Court dismissed plaintiffs' claims and provided them an opportunity to file an amended complaint. Plaintiffs did not respond to the order. Therefore, this case is **DISMISSED WITH PREJUDICE** as there are no claims remaining.

Done, this 25th of July, 2001.

s/Edwin L. Nelson

United States District Judge.

SMITH v. UPS, 296 F.3d 1244 (11th Cir. 2002)

FRANK H. SMITH, HARRIETT C. SMITH, Plaintiffs-Appellants v. UNITED

PARCEL SERVICE, (UPS), Defendant, PAMELA BURNETTE MARLOW, UNITED PARCEL

SERVICE, INC., (OHIO), et al., Defendants-Appellees.

No. 01-14463.

United States Court of Appeals, Eleventh Circuit.

Decided July 11, 2002.

John A Owens, Owens & Almond, LLP, Denise L. Evans, Tuscaloosa, AL,

for Plaintiffs-Appellants.

Rusha C. Smith, John E. Goodman, Bradley, Arant, Rose & White, LLP, Birmingham, AL, Ruth N. Borenstein, Paul T. Friedman, Morrison & Foerster, LLP, San Francisco, CA, J. Mark White, White, Dunn & Booker, Birmingham, AL,

for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of

Alabama. D.C. Docket No. 01-00306 CV-N-W.

Before: ANDERSON, DUBINA and BLACK, Circuit Judges.

DUBINA, Circuit Judge:

Frank and Harriett Smith (the "Smiths") appeal the district court's dismissal of their claims for fraud, negligence, wantonness, or willfulness, and outrage against the United Parcel Service ("UPS") and Pamela Burnett Marlow ("Marlow"), a UPS delivery person. The district court dismissed the Smiths' claims as preempted by the Carmack Amendment, 49 U.S.C. § 14706 (1994). We agree with the district court and hold that the Carmack Amendment preempts all of the Smiths' claims because the claims arise from conduct involving UPS's transportation and delivery services. Accordingly, we affirm the district court's dismissal of the Smiths' claims.

I. BACKGROUND

A. Facts

October 21, 1998, marked the beginning of an acrimonious relationship between the Smiths and UPS. On that date, Frank Smith, who is legally blind, and his son waited for UPS to deliver a computer to the Smiths' home. UPS failed to deliver the computer, and instead left a note at the Smiths' house explaining that it had attempted delivery. The Smiths called the UPS office and demanded that UPS deliver the computer that day.

UPS made two additional trips to the Smiths' home to deliver the computer. On the first attempted delivery, Harriett Smith asked her husband and son to assist the driver, Marlow, with the boxes. While at the truck, the parties exchanged harsh words, and the Smiths' son called Marlow an unflattering and derogatory name. Marlow responded by attempting to pull down the truck door and not delivering the computer. Frank Smith blocked the door on its descent. Marlow screamed for help, asserted repeatedly that "these are terrible people," closed the door of

her truck, and drove down the street where she parked for a period of time before leaving the area. Marlow promptly reported this altercation to the police, who investigated but arrested no one. Later that same evening, the local manager of the UPS office personally delivered the computer to the Smiths' residence.

Since the date of the altercation, UPS refuses to make regular deliveries to the Smiths' home. The Smiths allege that UPS continually promises to make deliveries to their home, but fails to keep those promises. Rather than regularly delivering packages to the Smiths' residence, UPS mails notices to the Smiths' home stating, "we are unable to complete delivery because: correct street number needed, not delivered." [R. Vol. 1 Tab 1.] UPS then places the Smiths' packages on "will call" at the local UPS office. Occasionally, if available, a driver other than Marlow, will deliver packages to the Smiths' house. The Smiths claim that all of the packages that they have picked up at the UPS office have been addressed correctly. Because Frank Smith is legally blind, he is unable to read the UPS notices or drive to the UPS office to retrieve packages if his wife is out-of-town. As a result, UPS has returned some packages to the senders.

B. Procedural History

On April 27, 2000, the Smiths filed suit against UPS and Marlow in the Circuit Court of Tuscaloosa County, Alabama, for monetary damages and injunctive relief alleging claims for fraud, negligence, wantonness, or willfulness, and outrage. The Smiths also alleged claims of discrimination in violation of Ala. Code § 27-2-1, and claims for suppression and conspiracy. Both UPS and Marlow asserted a preemption defense under the Carmack Amendment to all of the Smiths' state law tort claims. On January 3, 2001, the Smiths amended their complaint, adding new defendants and new claims. UPS and Marlow

removed the action in February of 2001and subsequently filed a motion to dismiss, which the district court granted. The district court found that the Carmack Amendment preempted the Smiths' claims and dismissed the case with prejudice. The Smiths then perfected this appeal.[fn1]

II. ISSUE

Whether the Carmack Amendment, 49 U.S.C. § 14706 (1994), preempts the Smiths' state law claims for fraud, negligence, wantonness, or willfulness, and outrage based upon UPS's allegedly wrongful acts.

III. STANDARD OF REVIEW

This court reviews the dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6) de novo, applying the same standard as the district court. Harris v. Ivax Corp., 182 F.3d 799, 802 (11th Cir. 1999). This court must accept the allegations set forth in the complaint as true for the purposes of a motion to dismiss. United States v. Pemco Aeroplex, Inc., 195 F.3d 1234, 1236 (11th Cir. 1999) (en banc).

IV. DISCUSSION

The Carmack Amendment creates a uniform rule for carrier liability when goods are shipped in interstate commerce. New York, New Haven, & Hartford R.R. Co. v. Nothnagle, 346 U.S. 128, 131, 73 S.Ct. 986, 988, 97 L.Ed. 1500 (1953); Adams Express Co. v. Croninger, 226 U.S. 491, 506, 33 S.Ct. 148, 152, 57 L.Ed. 314 (1913). To accomplish the goal of uniformity, the Carmack Amendment preempts state law claims arising from failures in the transportation and delivery of goods. Adams Express, 226 U.S. at 505-06, 33 S.Ct. at 152 ("Almost every detail of the subject is covered so completely that there can be no rational doubt but that Congress intended to take possession of the subject, and supersede all state regulation with reference to it."); see North Am. Van Lines, Inc. v.

Pinkerton Sec. Sys., Inc., 89 F.3d 452, 456 (7th Cir. 1996) (explaining that the Carmack Amendment "preempts all state or common law remedies available to a shipper against a carrier for loss or damage to interstate shipments").

The Smiths argue that their claims are separate and distinct from UPS's contract of carriage to deliver goods so that the Carmack Amendment's savings clause[fn2] excludes their claims from its preemptive effect. The savings clause of the Carmack Amendment preserves rights and remedies "not inconsistent with the rules and regulations prescribed by the provisions of this act." Adams Express, 226 U.S. at 507, 33 S.Ct. at 152. However, the Smiths' fraud and negligence, wantonness, or willfulness claims clearly relate to the delivery of goods.

The complaint alleges that UPS committed fraud by accepting shipments for delivery to the Smiths' home "knowing that they had no intention of fulfilling or attempting to deliver." [R. Vol. 1 Tab 1.] As for the negligence, wantonness, or willfulness claims, the Smiths allege that UPS "undertook a duty to deliver packages to [them]" and breached that duty "in failing and refusing to make deliveries to [them]." [R. Vol. 1 Tab 1.] Carmack Amendment preemption embraces all of these claims because it embraces "all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation. . . ." Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co., 241 U.S. 190, 196, 36 S.Ct. 541, 544, 60 L.Ed. 948 (1916); see also Southeastern Express Co. v. Pastime Amusement Co., 299 U.S. 28, 57 S.Ct. 73, 74 81 L.Ed. 20 (1936) (applying Carmack Amendment preemption to a negligence claim for failure to deliver a film in a timely manner); New York, Philadelphia & Norfold R.R. Co. v. Peninsula Produce Exch. of Md., 240 U.S. 34, 38, 36 S.Ct. 230, 232, 60 L.Ed. 511 (1916) (explaining that Carmack

Amendment preemption is "comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty with respect to any part of the transportation to the agreed destination"); Moffit v. Bekins Van Lines Co., 6 F.3d 305 (5th Cir. 1993) (upholding Carmack Amendment preemption of various state law claims, including fraud, intentional infliction of emotional distress, and negligence, when a moving company failed to deliver household goods to a new home in time for Christmas); Shao v. Link Cargo (Taiwan) Ltd., 986 F.2d 700, 706 (4th Cir. 1993) (concluding that because "the Carmack Amendment was intended by Congress to create a national uniform policy regarding the liability of carriers under a bill of lading for goods lost or damaged in shipment. . . . [a]llowing a shipper to bring common law breach of contract or negligence claims against a carrier for such loss or damage conflicts with this policy"); Underwriters at Lloyds of London v. North Am. Van. Lines, 890 F.2d 1112, 1121 (10th Cir. 1989) (holding that the Carmack Amendment preempted state and common law remedies against common carriers); Hughes v. United Van Lines, Inc., 829 F.2d 1407, 1412 n. 5, 1415 (7th Cir. 1987) (holding that the Carmack Amendment preempted a plaintiff's claims for negligence, breach of contract, conversion, intentional misrepresentation, negligent misrepresentation, and negligent infliction of emotional distress, where his goods were destroyed by a fire while in transit); Bear MGC Cutlery Co. v. Estes Express Lines, Inc., 132 F. Supp.2d 937, 947-48 (N.D.Ala. 2001) (finding Carmack Amendment preemption of alleged claims for negligence, wantonness, and outrage for failing to properly deliver goods).

The Smiths contend that UPS's misrepresentations that it would take different steps to insure delivery created a new relationship apart from the contract of carriage so that the Carmack Amendment

preemption does not apply. However, this contention does not alter the fact that the Smiths base their fraud and negligence, wantonness, or willfulness claims on UPS's failure to provide them with particular transportation and delivery services. Therefore, the Smiths' claims fall squarely within the preemption coverage of the Carmack Amendment. See, e.g., Pietro Culotta Grapes, Ltd. v. Southern Pac. Transp. Co., 917 F. Supp. 713, 715-16 (E.D.Cal. 1996) (finding the Carmack Amendment preempted tort and contract claims arising from alleged pre-shipment misrepresentations concerning delivery deadlines); United Van Lines, Inc. v. Shooster, 860 F. Supp. 826, 828-29 (S.D.Fla. 1992) (finding that the Carmack Amendment preempted a claim based on an alleged fraudulent estimate made to induce a contract).

Likewise, the Smiths' outrage claim falls squarely within the preemption coverage of the Carmack Amendment because it too is based on the same conduct – UPS's failure to deliver packages to the Smiths' home. The Smiths argue that the Carmack Amendment does not preempt their outrage claim, but rather the savings clause protects this claim, because a claim for outrage remedies an injury to their person rather than to their goods. This court has not determined whether the savings clause of the Carmack Amendment protects some claims because they remedy damage to a person, rather than goods. Among the circuits to visit this issue, the Fifth and Seventh Circuits have reached contrary conclusions.

In Moffit v. Bekins Van Lines Co., the Fifth Circuit held that the Carmack Amendment preempted all state law claims, including ones for intentional infliction of emotional distress and negligent infliction of emotional distress, when a moving company failed to deliver a family's belongings in time for Christmas. 6 F.3d 305, 307 (5th Cir. 1993). The Fifth Circuit reasoned that to hold

otherwise would defeat the Carmack Amendment's goal of uniformity. Id. The Seventh Circuit, on the other hand, held that the Carmack Amendment did not preempt a claim for intentional infliction of emotional distress. Gordon v. United Van Lines, Inc., 130 F.3d 282, 286 (7th Cir. 1997).

In Gordon, the plaintiff sued her carrier after it failed to deliver, and ultimately destroyed, several heirlooms during her relocation. 130 F.3d at 284. The plaintiff asserted several grounds of relief for the destruction of her property, including fraud, breach of contract, and willful and wanton conduct. Id. The Seventh Circuit held that the Carmack Amendment preempted all of those claims because those claims were essentially based on "the contract of carriage, in which the harm arises out of the loss of or damage to goods." Id. at 284, 289 (citing Hughes, 829 F.2d at 1407. However, the Seventh Circuit held that the plaintiff's claim for intentional infliction of emotional distress survived Carmack Amendment preemption. Id. at 289; But see Hughes, 829 F.2d at 1410, 1412 n. 5 (holding that the Carmack Amendment preempted state common law remedies, including negligent infliction of emotional distress). The Seventh Circuit, relying heavily on dicta from a First Circuit decision,[fn3] reasoned that "a number of situations" may exist "in which a carrier might remain liable to a shipper for certain kinds of separate and independently actionable harms that are distinct from the loss of, or the damage to the goods." Id. at 289 (citing Pinkerton, 89 F.3d at 458).

While we agree that situations may exist in which the Carmack Amendment does not preempt all state and common law claims, including ones for outrage, only claims based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption. See Morris v. Covan Worldwide Moving, Inc., 144 F.3d 377, 383 (5th Cir. 1998) (acknowledging that the Carmack

Amendment would not preempt claims "separate and apart from those resulting directly from the loss of shipped property," but holding that the Carmack Amendment preempted claims seeking damages for intentional infliction of emotional distress as well as punitive damages as a result of egregious conduct by a carrier in the course of discharging its duties); see also Gooch v. Oregon Short Line R.R. Co., 258 U.S. 22, 42 S.Ct. 192, 66 L.Ed. 443 (1922) (explaining that the Carmack Amendment did not preempt an action involving a physical injury to a caretaker accompanying an interstate shipment of cattle); Chicago, Rock Island & Pac. Ry. Co. v. Maucher, 248 U.S. 359, 39 S.Ct. 108, 63 L.Ed. 294 (1919) (holding that the Carmack Amendment did not preempt a claim by a plaintiff who was physically injured); Reeves v. Mayflower Transit, Inc., 87 F. Supp.2d 1251, 1252, 1254 (M.D.Ala. 1999) (finding that the Carmack Amendment preempted an intentional infliction of emotional distress claim arising from the alleged failure of a carrier to perform the service of packing, shipping, and delivering goods as contracted). In other words, separate and distinct conduct rather than injury must exist for a claim to fall outside the preemptive scope of the Carmack Amendment.

The Smiths allege outrage in that the "actions of [UPS] to deny deliveries to [them] have been intentional and have been designed to inflict emotional distress." [R. Vol. 1 Tab 1.] Although the Smiths seek a remedy for an injury to their person, the claim results solely from the loss of and misdelivery of their goods. Therefore, the Smiths' outrage claim is embraced by the preemptive effect of the Carmack Amendment.

The Smiths argue that while the controversy involves packages, no doubt exists that if a UPS driver intentionally assaulted and injured them, the Carmack Amendment would not preempt their cause of action. We

agree. However, the Smiths argue further that their claims under these facts are indistinguishable. To the contrary, we conclude that their claims are vastly different. Their claims of fraud, negligence, wantonness, or willfulness, and outrage all arise from UPS's failure to deliver their packages. The Smiths allege no conduct separate and distinct from UPS's failure to transport and deliver packages. Therefore, the Carmack Amendment preempts the Smiths' state law tort claims.

V. CONCLUSION

The Supreme Court of the United States has described the preemptive effect of the Carmack Amendment very broadly. Blish Milling Co., 241 U.S. at 196, 36 S.Ct. at 544. The Carmack Amendment embraces "all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation." Id. Because the Smiths base all of their claims on allegations concerning UPS's failure to provide them with transportation and delivery services, the Carmack Amendment preempts their claims. Accordingly, we affirm the district court's judgment of dismissal.

AFFIRMED.

[fn1] The Smiths appeal only the district court's dismissal of their fraud, negligence, wantonness, or willfulness, and outrage claims. We thus consider the other claims abandoned. Baker v. Montgomery, 811 F.2d 557, 558 n. 1 (11th Cir. 1987). [fn2] The savings clause states: "Except as otherwise provided in this part, the remedies provided under this part are in addition to the remedies existing under another law or common law." 49 U.S.C. § 15103 (1996). [fn3] The Seventh Circuit decision in Gordon v. United Van Lines, Inc. relies in part on Rini v. United Van Lines, Inc., 104 F.3d 502, 506 (1st Cir. 1997), in which

the First Circuit indicated in dicta that "a claim for intentional infliction of emotional distress alleges a harm to the shipper that is independent from the loss or damage to goods and, as such, would not be preempted." 104 F.3d at 506. The First Circuit further stated that if a plaintiff, who had several items disappear during a move, had proven her claim for intentional infliction of emotional distress at trial that the Carmack Amendment would not have preempted that claim. Id. Page 1250